IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON ALAN STENSRUD, Appellant.	No. 32819-4-II UNPUBLISHED OPINION

HOUGHTON, P.J. -- Jason Stensrud appeals his conviction of second degree murder and first degree criminal mistreatment relating to the death of his newborn daughter. Although the State informed the court it did not view the crimes as "anything involving Satanism" or an "act of Satanism," it nevertheless offered extensive evidence of Stensrud's involvement with Satanism to prove motivation and intent, arguing that someone deeply entrenched in a Satanic lifestyle would be more likely to kill a weak or ill baby.

Stensrud argues that he did not receive a fair trial because the court admitted improper character evidence and opinion testimony, excluded proper reputation testimony, and gave erroneous jury instructions. He also claims that he received ineffective assistance of counsel and that insufficient evidence supports his convictions. We agree that Stensrud did not receive a fair trial as a result of the court's admission of improper testimony and reverse and remand for a new

trial.

FACTS

Jessica Dearinger became pregnant while she was dating Stensrud. She told him about the pregnancy after she felt the baby moving inside her. Dearinger and Stensrud (then ages 19 and 21, respectively, but still living at their parents' homes) concealed the pregnancy from their parents. She did not seek any prenatal care. She had other health issues during her pregnancy, however, that required x-rays and prescription medications. In addition, she smoked, took methamphetamine, and drank alcohol throughout her pregnancy. Dearinger and Stensrud discussed giving the baby up for adoption. But they worried no one would want the baby, anticipating harmful consequences of the x-rays and drugs.

Stensrud told his co-workers and other friends about Dearinger's pregnancy. He seemed "upbeat" about having a baby. 3 Report of Proceedings (RP) at 133. On May 6, 2001, he called work and said he could not come in that day because Dearinger was having her baby. His supervisors announced over an intercom system that he and Dearinger were having the baby.

Dearinger and Stensrud spent that evening in her bedroom at her parents' home in Tacoma. She was having labor contractions and her water broke. According to Stensrud, they planned to go to the hospital for the baby's birth. But she did not want to go until she was in the advanced stages of labor because she did not want to spend a long time at the hospital. She had some familiarity with the birthing process through her training to become a certified nursing assistant. They both were high on drugs.

According to Stensrud, when he told Dearinger they should leave for the hospital, she agreed but said she needed to use the bathroom first. She went into the bathroom while Stensrud

waited in the bedroom. A short time later, she came out with a baby girl wrapped in a towel. The baby was still attached to the umbilical cord. She told Stensrud to cut the cord with the scissors of a multi-use Swiss army-style knife. He did so. But neither he nor Dearinger clamped the umbilical cord afterwards. The baby struggled to breathe.

The baby's appearance surprised Stensrud as she did not look like what he expected. A chalky substance covered her, she appeared discolored, and her feet seemed deformed. The baby began to cry. Stensrud and Dearinger were afraid that Dearinger's parents would hear the baby. Stensrud held the baby for about a half minute. During that time, he placed his hand over her mouth, attempting to quiet her. When he realized the baby could not breathe through her nose, he removed his hand and gave her back to Dearinger.

According to Stensrud, they planned to take the baby to the hospital, but Dearinger directed him to clean the bathroom first so her parents would not find out she had given birth. He went into the bathroom and spent about five minutes wiping up the blood. When he came back into the bedroom, Dearinger was on the bed with the baby beside her, lifeless. According to Stensrud, Dearinger told him they did not need to go to the hospital anymore because she stopped the baby from suffering.

Neither Dearinger nor Stensrud called 911 and neither attempted to resuscitate the baby. According to Stensrud, he asked Dearinger what they were going to do, and she told him that she had carried the baby for nine months, and now it was his responsibility to dispose of the body.

Stensrud put the baby and the placenta in a shopping bag and then put the bag in a closet. Several hours later, the couple left the house with the baby in the bag. Stensrud placed the baby in the trunk of his car. Then they ran some errands and drove to Stensrud's home in Belfair.

According to Stensrud, while they were traveling to his home, Dearinger told him she had wrapped her hand in a towel and "stopped it from suffering" by covering the baby's mouth. 5 RP at 389. They left the baby in the trunk of Stensrud's car while they went inside, played video games, watched movies, and rested.

The next day, Stensrud went to work and told his friend, Nick Bohannan, that he urgently needed to speak with him. He appeared pale and anxious. He told Bohannan, "We killed the baby." 3RP at 104. When Bohannan asked Stensrud what happened, Stensrud replied that Dearinger gave birth in the bathroom and when the baby started crying she tried to quiet the baby and smothered her. Stensrud told Bohannan that he was in another room when it happened. Stensrud did not tell Bohannan that he knew Dearinger was going to smother the baby when he left her to clean the bathroom. According to Bohannan, Stensrud said that he placed some personal items in the bag with the baby's body because of a Satanic belief that the items would protect the baby in the afterlife.

Stensrud asked Bohannon for advice on how to dispose of the body. They discussed putting the baby in the trash compactor, throwing it off the Tacoma Narrows Bridge, and burying it on his parents' property. Stensrud decided to bury the baby on his parents' property. He put the baby inside a Styrofoam cooler and placed the cooler in the pump house at his parents' home.

Bohannan told his sister, who told her employer, a municipal court judge. The judge notified authorities, who then interviewed Bohannan. Bohannan told the police that Stensrud saw Dearinger smother the baby and did nothing to prevent it. At trial, however, Bohannan said, "I may have . . . phrased that poorly, because I do not remember at all and that's something that I do think would have seriously stuck out in my head, that he said he was in the room and watched her

do it." 3 RP at 128. He testified that Stensrud told him he had been cleaning the bathroom at the time and that the baby was dead when he came back into the bedroom.

The police went to Stensrud's home to investigate. Stensrud agreed to talk with the police. First he said the baby was stillborn. Then he said the baby was born alive but died shortly thereafter on its own. Finally, he said that Dearinger told him that she had smothered the baby while he was cleaning the bathroom. Stensrud directed the police to the baby's body. Inside the container with the baby, the police found a bracelet, two small stuffed animals, and part of a beaded necklace with a metal eagle charm attached.

An autopsy revealed that the baby was born alive and died from asphyxiation. The baby was full-term, weighed 7 pounds, was 18½ inches long, and had no congenital abnormalities or deformities. The baby had a high level of methamphetamine in her bloodstream, which contributed to her death. The failure to clamp the umbilical cord was likely a contributing factor in the baby's death, although the State's expert testified that there was no reasonable medical certainty that it was a cause of death.

The police searched Dearinger's home. They found blood splattered throughout her bedroom and the strong smell of chemicals in the bathroom. They also found a blood-stained, multi-use utility knife. The police arrested Dearinger. She pleaded guilty to controlled substance homicide.

The State charged Stensrud with second degree murder on the alternative theories of intentional murder and felony murder. The predicate felony for the felony murder charge is first or second degree criminal mistreatment. The State alleged that Stensrud committed first and/or second degree criminal mistreatment by failing to seek medical attention for the baby, thereby

causing her death. The State also charged him with first degree criminal mistreatment and unlawful concealment of a body.

Dearinger and Stensrud shared an affinity for "Goth" style music and dress. They adorned their bedrooms with Goth-style posters and ornaments. The posters feature grotesque scenes of violence, nudity, sadomasochism, torture, and death. Dearinger painted her bedroom walls and ceiling black. Nails protrude from the ceiling. Prescription pill bottles hang from the ceiling. Posters of Marilyn Manson cover the walls. The police recovered a CD cover from Dearinger's bedroom from a band called "Dying Fetus." Ex. 115.

Stensrud's bedroom walls are plastered with similar grotesque posters. A black cloth hangs from the ceiling. One poster shows a nude woman below the caption "Praise the Whore." Ex. 122. The woman wears a crown of thorns and her hands are held up. Blood trickles from wounds on her hands and chest. In another poster, a woman lies prone on top of a sarcophagus. Chains wrap her body. She is nude except for black leather gloves, boots, and underwear. Her body is splattered with blood. The caption includes the words "Cradle of Filth" and "Life is My Sacrifice." Ex. 125, 132.

Another poster shows a nude woman tied to a post with her hands tied behind her back, arrows protruding from her abdomen. Another poster, captioned "Cradle of Filth," depicts three woman attired in black leather. One woman lies dead on an autopsy table. Her chest is cut open. A bloodstained butcher knife is on a metal tray alongside her. A second woman is on top of the dead body, in a sexual pose, her tongue protruding. A third woman wears a black leather mask. She is injecting the dead woman with some substance from a large needle syringe. An IV bottle full of blood hangs alongside. Ex. 125.

Taped to Stensrud's bedroom door is a picture of someone nailed to an inverted cross with the caption "Desire" and a cut-out message, "Are you welcome in Hell? You can be." Ex. 132.

Also taped to Stensrud's bedroom door is a page torn from a children's coloring book that uses Mickey Mouse characters to illustrate the "Christmas Carol" story. Ex. 94. The page shows Mickey and Minnie Mouse standing over their young mouse, Tiny Tim. Minnie is shown holding Tiny Tim's crutch over her shoulder. The picture has been altered with crayons to turn the crutch into a double-blade axe. The caption reads, "Tiny Tim is not well." Written below the caption is the hand written message, "He's bleeding. They're hungry and must eliminate the sick in order to stay alive. Bye bye Tiny Tim." The word "Kill" is written in the margins and within the picture dozens of times. On the reverse side, an elderly Donald Duck, dressed as Scrooge, is looking out the window. The caption reads, "Scrooge feels sad about Tiny Tim." In handwriting, the following message completes the sentence: "He's hungry too. He wants Tiny Tims head for breakfast, brains and eyeballs. Yummy!" The word "Satan" is spelled out on the side, among a jumble of other random letters. Ex. 94.

Stensrud's bedroom is littered with videotape game and CD cases depicting Goth themes of violence, death, and explicit sexuality. There are spiked leather bracelets on the floor and numerous black candles throughout the room. There are also a number of black candles and a gargoyle on a corner table.

During a pretrial videotaped deposition of an officer who interviewed Stensrud, the State elicited testimony that Stensrud agreed with everything Bohannan told the police except that he denied telling Bohannan that he did any sort of Satanic ritual with the baby's body. Defense

counsel objected to the testimony, arguing that any references to Satanism or a Satanic ritual were irrelevant and unfairly prejudicial. The trial court overruled the objection, stating, "Although it appears to be highly prejudicial, it doesn't appear to outweigh its relevancy at this point in time, since there is the issue as to the actual murder of the child at this point." RP (Mar. 8, 2004) at 36.

Defense counsel moved in limine to exclude "[a]ny evidence as to the alleged reputation of the Defendant Stensrud for violent conduct" and "[a]ny evidence regarding allegations that the Defendant was in any way involved in Satanism or any related type of activity or belief." Clerk's Papers (CP) at 36-37. In arguing the motion, defense counsel acknowledged that the court had already admitted references to a Satanic ritual but asked the court to exclude photographs of Stensrud's bedroom. The State stipulated to the exclusion of reputation evidence, but it opposed the exclusion of evidence of Satanism, stating, "granted, it may not be the state's theory that this was anything involving Satanism, [but] it still is part of the case." 2 RP at 11.

The State argued that evidence of Stensrud's association with Satanism was relevant because it would corroborate Bohannan's testimony that Stensrud said he had performed some kind of "Satanic ritual" by putting things into the bag with the baby. Defense counsel replied that the State could adequately corroborate Bohannan's testimony by showing the items found with the baby, without referring to a Satanic ritual.

The trial court responded, "I'm not going to restrict anything yet at this point in time with regard to [Dearinger's] bedroom, but I will grant it with respect to Jason Stensrud's bedroom and anything like that would be outside of the statements made to Nick Bohannan or the condition of where the infant was found." 2 RP at 15.

At another pretrial motion hearing about three weeks later, the State asked the trial court

to reconsider its ruling. The State argued that evidence of Stensrud's involvement in Satanism was relevant to establish motive, basing its argument on three facts. First, Stensrud had told a police officer that he and Dearinger were involved in Satanism "simply because it conflicts with Christianity, morals, and values, but that he was not into violence or hurting anyone." 2 RP at 42. Second, several months earlier, Stensrud told Bohannan that he had visited a psychic who told him that he could become the "Antichrist" if he bathed in the blood of his first born child. 2 RP at 42. Finally, Stensrud told Bohannan that there is a Satanic belief that a personal item placed with a deceased will protect the deceased in the afterlife.

The State again argued that finding Stensrud's personal items with the baby corroborates Bohannan's testimony and shows that Stensrud "believed in Satanism." 2 RP at 42. But the prosecutor said, "I can't say that that's going to be our overall theme in this case, that this was an act of Satanism, because that's not our theory. But I do think that it was motivation, or at least his belief that there was really nothing wrong with killing this baby because it was going to, I guess, accelerate him in the eyes of the Antichrist or what have you. But I do think it's relevant." 2 RP at 42-43.

Stensrud objected, arguing that the evidence was highly prejudicial but of slight or no probative value, given that it was not the State's theory that the killing was an act of Satanism.

In referring to the trial court's earlier ruling, defense counsel said he understood that the trial court had excluded references to Satanism except for those that came in during the videotaped deposition. Similarly, the prosecutor stated, "If I recall the court's ruling, it was that Nick Bohannan could still testify as to the defendant's statements and the detectives that we took the videotape depositions of could give still that testimony, but I do recall that Your Honor

suppressed any photographs of the defendant's bedroom, as well as any reference by the detectives as to what they saw in the bedroom." 2 RP at 43-44.

The trial court asked the judicial assistant to check the court record. The judicial assistant stated, "Court grants motion with respect to defendant's bedroom, but not as to statements made by defendant to Mr. Bohannan." 2 RP at 44.

The trial court ruled,

> Based on the allegations in Sergeant [sic] Taylor's report with regard to statements by the defendant, it appears that the relevancy does outweigh the prejudice in this regard. So I will allow for the references to Sergeant [sic] Taylor's report.
>
> I have looked at the pictures. Do you know which one is a picture of his bedroom? It appeared to me that the ones I remember of his bedroom, you can't really see very much in them anyway.

2 RP at 45-46.

Stensrud also moved to exclude evidence that he used drugs or shared them with Dearinger during her pregnancy. The trial court overruled the objection, stating that the evidence was admissible to show that he had knowledge of the baby's need for medical care at the time of birth because of Dearinger's drug use.

At trial, Bohannan testified that Stensrud said he had done "some kind of, I don't know, ritual, I guess you could say, with [the baby]." 3 RP at 111. Bohannan also testified that, several months earlier, Stensrud said he visited a psychic who told him "he could become the Antichrist if he bathed in his firstborn's blood." 3 RP at 112. He stated that Stensrud had appeared to regard the psychic's comment as a joke and Bohannan interpreted it as such.

The prosecutor asked, "Do you know what type of ritual this was? Without getting specific, do you know if it was a Christian ritual?" Bohannan replied, "I believe it was Satanic."

3 RP at 112. The prosecutor asked, "How clearly do you remember the defendant telling you that he had performed some type of Satanic ritual on the victim?" Bohannan replied, "Very clear." 3 RP at 113. When asked to describe the ritual, Bohannan said Stensrud told him "what he had done was more of a protection ritual kind of into the next world or whatever. He had put a statue or a little model, actually, in the container with the baby." 3 RP at 129. The purpose of the ritual was to protect the baby.

The prosecutor elicited testimony from Bohannan that Stensrud was "in the Goth culture." 3 RP at 143. When asked to describe "Goth culture," Bohannan said, "A lot of dark clothes. He had a pair of boots that had a steel-protected plate on the front. A lot of spikes that he put on like his boots and clothes and stuff like that, just pretty much the whole lifestyle." 3 RP at 143. He described Goth music as "really dark, fairly brutal," with lyrics relating to "murder, drugs, anything like that." 3 RP at 144.

Bohannan also testified that Stensrud often consumed methamphetamine at work and at home and that he supplied Dearinger with methamphetamine.

The prosecutor asked the investigating officer, Lieutenant Taylor, to describe Stensrud's appearance when he arrived to execute the search warrant. Taylor responded, "He had a couple of rings and some type of a medallion that had like a Satanic-type pentagram or a Satanic-type kind of arrangement on it." 4 RP at 320. When asked to elaborate, Taylor said, "one looked like some type of a devil or skull. It was a pretty good-sized ring." 4 RP at 320.

When asked to describe Stensrud's demeanor during police questioning, Taylor replied that he was calm, cooperative, and unemotional. In response to the question, "Did he have a demeanor other than what you consider to be the normal affect of a person?," Taylor replied, "I

wouldn't consider Mr. Stensrud's demeanor normal. He was really subdued, as if it was just another day in paradise." 4 RP at 371. Stensrud objected and the trial court sustained the objection and instructed the jury to disregard the phrase "just another day in paradise." 4 RP at 371.

The prosecutor asked Taylor whether he had spoken with Stensrud about his Satanic beliefs. Taylor replied, "He simply said that he was involved in Satanism simply because it conflicted with Christianity, morals, and values, but he wasn't into hurting anyone." 4 RP at 373.

On cross-examination, Stensrud's counsel elicited testimony from Taylor that Stensrud denied believing in the power of Satanic rituals and that his interest in Satanic jewelry and clothing was "a different thing." 5 RP at 416. When Taylor asked Stensrud to explain the difference, he replied that some Satanists are simply atheists while others actually hate God. Stensrud said he was in the former group and did not believe in the power of Satanic rituals. When asked whether he was "into hurting anybody or anything like that," Stensrud told Taylor he "never hurt anything." 5 RP at 416.

Outside the jury's presence, the prosecutor asked the court to reconsider its prior ruling excluding the posters and Mickey Mouse illustration and other evidence of Satanism found in Stensrud's bedroom, arguing that Stensrud's cross-examination of Taylor opened the door to such evidence.

Stensrud's counsel responded that he did not open the door because the State had first brought up the issue of Satanism when the prosecutor elicited testimony that Stensrud was involved in Satanism "because it conflicted with Christianity, morals, and values, but he wasn't into hurting anyone." 5 RP at 422. Stensrud's counsel argued that the State could not open the

door through their own witness to evidence of Stensrud's possible violent character, particularly given the State's stipulation to the exclusion of evidence of Stensrud's character for violence.

The prosecutor said, "We are trying to get to justice here. We are leaving the jury with the impression that he doesn't hurt anything, and that is absolutely contrary to the evidence." 5 RP at 423.

The trial court reviewed the transcript of Taylor's testimony and determined that the State had, in fact, first elicited Taylor's testimony that Stensrud said he "wasn't into hurting anyone." 5 RP at 422. The trial court ruled,

> It's clear to me that the state's witness Lieutenant Taylor did answer with regard to defendant's statements about never hurting anything and his testimony with regard to the first interview that was not taped, and the fact that [defense counsel] cross-examined him on the same statement in the taped interview does not open the door to having the motion in limine on the topic, which was stipulated to by the prosecutor in the first place, to be reopened at this point in time. So I'll deny the request.

5 RP at 424.

Addressing the prosecutor, the trial court said, "I won't allow your request to add additional testimony from the transcript of the interview as consistent with the stipulation as to defendant's motion in limine." 5 RP at 425.

Both the prosecutor and defense counsel requested clarification of the ruling. The trial court replied,

> I denied your request to ask about the additional information with respect to the Mickey Mouse cartoon. I have just given the reason for that, repeating the reason for that.
>
> This was, first of all, covered by the as to the defendant's motion in limine and was not opened by [defense counsel] in his cross-examination of Lieutenant Taylor.

5 RP at 425-26. The prosecutor asked the trial court whether it was ruling that the State could not introduce the Mickey Mouse illustration.

The trial court responded that it had not ruled on the admissibility of the Mickey Mouse illustration or photographs of Stensrud's bedroom. Rather, it was the trial court's understanding the parties stipulated to their exclusion when the State agreed not to present evidence of Stensrud's reputation for violent conduct. The State asked the trial court to confirm that "there was a stipulation that [the Mickey Mouse illustration is] not admissible assuming the defense did not open the door, and the court is ruling that the defense did not open the door." The trial court replied, "Correct." 5 RP at 426, 427. But the issue arose again during the State's presentation of evidence recovered at Dearinger's home.

Outside the jury's presence, one of the prosecutors indicated that the State had not intended to agree to the exclusion of evidence from Stensrud's bedroom when it stipulated to the exclusion of evidence of Stensrud's reputation for violent conduct. Rather, both the State and defense counsel had understood that the trial court excluded the evidence when it granted Stensrud's pretrial motion to exclude references to Satanism, except for his statement to Bohannan about performing a Satanic ritual and his statement to Taylor about being involved with Satanism because it conflicted with Christian morality and values.

The trial court said, "It appears to me that there was some misunderstanding as to the Mickey Mouse poster itself. It is not the subject of any ruling by me on a motion in limine by the defense. So at this time then, I will entertain [defense counsel's] motion to exclude any further reference to it. I believe I have heard argument on it. I'll reference your prior argument with regard to that." 5 RP at 532.

Stensrud again moved to exclude the bedroom evidence, arguing that it was highly prejudicial, with only slight probative value in view of the State's assertion that it did not consider the killing to be an act of Satanism.

The State argued that the Mickey Mouse illustration was admissible to rebut testimony elicited during cross-examination of Taylor that Stensrud "was not into violence." 5 RP at 534. Defense counsel replied, "Your Honor, I think that's the same argument we had this morning. The state is the one that introduced that evidence about the violence, and that came from a state's witness. And for them to be able to bootstrap that into being able to use that poster is an invalid argument." 5 RP at 534.

Contrary to its ruling earlier that day, the trial court agreed with the State that Stensrud opened the door to the Mickey Mouse illustration by eliciting Taylor's testimony that Stensrud said he "never hurt anything." The trial court said,

> I'm going back to the start, which is that I did not have before me this issue previously. And because it appears that I can't make any finding about any type of agreement between [defense counsel] and [the prosecutor], I'm going to consider the issue anew. And I don't have the transcript in front of me that [defense counsel was] questioning Lieutenant Taylor about, but it appeared to me that the next question about the poster was a result of the witness's answer with respect to the defendant's response.

5 RP at 534.

Defense counsel clarified that by "defendant's response," the trial court was referring to the statement, "Never [hurt] anything." 5 RP at 534. The trial court said, "Correct. For that reason, I find that it is relevant and the relevance outweighs the prejudice in this case. So I will allow inquiry into the poster." 5 RP at 534.

Defense counsel again pointed out that it was the State that first brought up the statement,

but the trial court adhered to its ruling, stating, "I did my balancing I'm required to do about relevance outweighing prejudicial effect in this case." 5 RP at 535. Defense counsel asked, "The relevance is?" The trial court replied, "To the defendant's response." Defense counsel asked, "Which was elicited by the police?" The trial court replied, "Correct." 5 RP at 535.

The State further argued that photographs of Stensrud's bedroom were relevant to show that he and Dearinger "were living a similar existence with that type of photo on the wall." 5 RP at 537.

Over Stensrud's objection, the State introduced photographs of Dearinger's bedroom showing nails protruding from the ceiling, prescription pill bottles hanging from the ceiling, and grotesque posters of Marilyn Manson. Defense counsel argued that the photographs were irrelevant and unduly prejudicial. The State replied, "Your Honor, they depict the bedroom where, obviously, the baby was born and evidence was collected. They accurately reflect that bedroom, and I would ask they be admitted at this time." 6 RP at 561. The trial court stated, "It does appear that they are relevant, so I'll overrule the objections and admit [the photographs]." 6 RP at 561; Exs. 53-61, 68.

Arguing that it was irrelevant and prejudicial, defense counsel objected to the admission of a CD wrapper for a band called "Dying Fetus," which the police recovered from Dearinger's bedroom.

The State argued,

> Your honor, there has been testimony, obviously, that Mr. Stensrud and Ms. Dearinger lived in a different type of lifestyle, dressing Goth, listening to bizarre music. This is one more indication of that, that they had recently had bought a CD of this music. It's ironic that the name of it is Dying Fetus. Nonetheless, it is an item that was found. It was recovered by the detectives. And it is relevant to go to, again, the theory of the case that they are into bizarre music and a different

lifestyle.

6 RP at 585. The trial court ruled, "It does appear to be relevant to the prosecutor's theory of the case and it would outweigh the prejudicial effect, so I'll overrule the objection." 6 RP at 586.

Stensrud's counsel asked the court to clarify its view of the CD's relevance. The State argued that "[i]t goes to the fact that these people did not want this baby. They are holding on to CD covers that talk about dying fetuses." 6 RP at 587. The trial court stated, "For the reasons stated by the prosecutor, I will be overruling your objection." 6 RP at 587.

Over Stensrud's objection, the State introduced photographs and a videotape of Stensrud's bedroom. The videotape focuses on the picture depicting a person crucified on an inverted cross with the caption "Desire." Ex. 132. Then it pans out to show the other pictures on Stensrud's door, including the message, "Are you welcome in Hell? You can be," "Titty Twister," and the Mickey Mouse illustration. Ex. 132. Inside the bedroom, the camera shows a black carpet with a pentagram, black cloth covering the window, a chain of handcuffs, black candles throughout the room, and a table with a pentagram-embossed plate and numerous partially burnt black candles. The camera pans the posters.

The State argued that the videotape and bedroom photographs were necessary to show that Dearinger and Stensrud shared a similar "mind-set" and to rebut testimony that Stensrud was involved in Satanism, but not violence. 6 RP at 651. Stensrud argued that the evidence was not relevant to prove complicity because the fact that they both had "weird pictures" on the wall does not logically support an inference that they acted together to murder the baby. 6 RP at 652.

The trial court ruled,

> I understand that it may not appear to be logical and may appear to be prejudicial to the defendant. However, the relevance outweighs that prejudice in light of the

> allegations by the prosecutor that this was a conspiracy between the two of them or an action between the two of them for like-minded reasons with respect to their Satanic-Goth beliefs or whatever you want to call them.

6 RP at 652.

After the trial court admitted all the State's evidence of Stensrud's involvement with Satanism, his counsel stated that although he had not planned to present character testimony, he felt compelled to do so to rebut the State's evidence portraying Stensrud as a violent Satanist. He requested a continuance to prepare for such testimony. The trial court agreed.

Sara Hansord is a friend of Dearinger and Stensrud. She testified that she gave the Mickey Mouse coloring book to Dearinger. Dearinger colored it in and gave it to Stensrud. She also testified that she never saw Stensrud perform a Satanic ritual. On cross-examination, the State questioned her extensively about whether she was familiar with the various Satanic items found in Stensrud's bedroom, including what the prosecutor characterized as a "Satanic-type altar." 7 RP at 732. She admitted that she saw the items in his bedroom.

Amber Roberts and Jimi Schwandt are Stensrud's friends. They testified that they never saw Stensrud performing any sort of Satanic ritual, black magic, or voodoo. On cross-examination the State asked if they were aware Stensrud told police that he was into Satanism because it conflicted with Christian morals and values. They were not aware of that fact. The State also cross-examined them about the Satanic items found in Stensrud's bedroom. They admitted that the items were consistent with Satanism.

Jason LaPolla is also a friend of Stensrud. He testified that he never saw Stensrud performing any Satanic rituals. He also said that he was familiar with the band Dying Fetus, that he had attended three of their concerts, and that their music CDs were available in regular music

stores. He said that the band's lyrics were mostly unintelligible. On cross-examination, the prosecutor asked him if he had heard the band's songs titled "Killing on Adrenaline"; "Purification Through Violence"; "Grotesque Impalement"; "Blunt Force Trauma"; "Beaten Into Submission"; "Skull Fight"; "Rape on the Altar"; "Scum: Fuck the Weak"; "Infatuation with Malevolence"; "Your Blood is My Wine"; "Vomiting the Fetal Embryo"; "Tearing Inside the Womb"; "Kill Your Mother, Rape Your Dog"; "One Shot, One Kill"; "Forced Elimination"; "Destroy the Opposition"; "Epidemic of Hate"; and "Justifiable Homicide." 7 RP at 779-82.

The prosecutor also asked LaPolla whether he had seen the items found in Stensrud's bedroom and if he was aware that Stensrud told an officer he was into Satanism because it conflicted with Christianity and morals and values. LaPolla replied, "I knew that conflicting on the Christian religion would be something that, yeah, he would do." 7 RP at 791.

Stensrud's mother testified that she never saw Stensrud perform a Satanic ritual and that he used the pentagram plate in his bedroom to burn incense. She also testified that Dearinger told her she had put the Mickey Mouse illustration on Stensrud's bedroom door. On cross-examination, the prosecutor asked her whether she was aware that Stensrud had a Satanic bible that he kept on a bookcase next to the "regular Bible." 8 RP at 24.

Stensrud offered testimony by Linda Rush, a pastor at the church Stensrud's parents attended in Belfair. She made the funeral arrangements for the baby and became acquainted with Stensrud while he was free on bail before trial. As the pastor in a small community, she was familiar with Stensrud's reputation for nonviolent conduct. But she had moved to Belfair and met Stensrud after the baby's death. She learned of Stensrud's prior reputation from his former teachers, school mates, and other people in the community. The trial court excluded her

testimony, ruling it was irrelevant because Rush did not know Stensrud before the alleged crimes occurred.

The prosecutor began closing argument by reminding the jury that "[y]ou have heard a lot about his world in the last three weeks. You have heard that it was a world of bizarre interests, Satanic beliefs, drugs and ultimately death." 9 RP at 28. The prosecutor said,

> We know how the defendant feels about sick people. We know because he proudly displays this Mickey Mouse cartoon on his door. And I know there has been some talk that [Dearinger] is the one that wrote it, but the fact remains that he proudly displays it. It's a cartoon about Tiny Tim not being well, he is bleeding, they are hungry and must eliminate the sick in order to stay alive. Bye-bye, Tiny Tim. So we know what the defendant's opinion of sick people or sick babies are. You must eliminate the sick. And that's exactly what he and [Dearinger] did on May 7th.

9 RP at 47.

In rebuttal argument, the prosecutor said,

> The state doesn't have to prove that the defendant is a Satanist. The state doesn't have to prove that the defendant uses lots of drugs. The state doesn't have to prove that the defendant is a bad guy. Don't let those confuse you. Those are pieces of evidence you can consider when you look at the actions of the defendant and look at the actions of what he did. None of the jury instructions talk about, well, the state must prove that the defendant is a drug user or that he worships Satan or that he is a bad guy. The state has certain elements it needs to prove, and those are the only elements. Please do not convict the defendant because you think he is a bad guy. Convict the defendant because he committed this crime.

9 RP at 114.

Later, the prosecutor asked the jury to consider the CD wrapper and "think of the name of the band, of the group, Dying Fetuses." 9 RP at 117.

The prosecutor also argued, "Everything they did through their drug usage, to their Satanic worship, and if you look again on the back of this exhibit, if you look at the lettering on

here, it says S-A-T-A-N. Satan is spelled out. Look at that." 9 RP at 124.

The jury returned a guilty verdict on all counts. In an interrogatory, the jury found that the State had proved all the elements of both intentional murder and felony murder. But the jury did not indicate whether it found Stensrud guilty as a principal or an accomplice.

Stensrud moved for a new trial and/or arrest of judgment. The trial court denied the motion. The trial court sentenced him at the top of the standard sentencing range, including 244 months for second degree murder, 17 months for criminal mistreatment, and 3 months for unlawful concealment of a body. Stensrud appeals.

ANALYSIS

Evidence of Satanism

Stensrud first contends that the trial court deprived him of a fair trial by admitting extensive evidence of his Goth and Satanic lifestyle and drug use. He argues that the evidence was irrelevant and/or unduly prejudicial and that the State impermissibly used it to establish his criminal propensity.

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

ER 404(b)[1] prohibits the admission of evidence to show the character of a person to prove

[1] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

the person acted in conformity with it on a particular occasion. *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Although inadmissible to prove criminal propensity, evidence of prior acts may be admissible for other purposes, including proof of motive, intent, and the circumstances surrounding the alleged crime. *State v. Monschke*, 2006 Wash. App. LEXIS 1104 at 39.

Evidence of prior bad acts is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This includes "'acts that are merely unpopular or disgraceful.'" *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 Karl B. Tegland, Washington Practice: Evidence §114, at 383-84 (3d ed. 1989)). To admit such evidence, a trial court must determine: (1) the prior bad act occurred by a preponderance of the evidence; (2) the evidence is offered for an admissible purpose; (3) it is relevant to prove an element or rebut a defense; and (4) the evidence is more probative than prejudicial. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). A trial court should resolve doubts as to admissibility in favor of exclusion. *Thang*, 145 Wn.2d at 642.

Evidence is relevant if it has any tendency to make the existence of any material fact more or less probable. ER 401. But even relevant evidence is inadmissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403.

The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). In determining whether the probative value of evidence outweighs its unfair prejudice, a court should consider the availability of other means of proof and other factors. *Powell*, 126 Wn.2d at 264. When evidence is unduly prejudicial, "the minute peg of relevancy is said to be obscured by the

dirty linen hung upon it." *State v. Turner*, 29 Wn. App. 282, 289, 627 P.2d 1324 (1981).

We find no Washington case dealing with the admissibility of a defendant's ties with Satanism.[2] But cases involving gang affiliation evidence prove instructive.

Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. *See State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995).[3] Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. *Dawson v. Delaware*, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); *Campbell,* 78 Wn. App. at 822.

Like gang affiliation evidence, evidence of a defendant's ties to Satanism is both highly prejudicial and implicates constitutional rights of freedom of association and freedom of expression. Satanism is essentially synonymous with evil character. "Satanism" is defined as "1: innate wickedness: Diabolism, 2: obsession with or affinity for evil, [*specifically*]: the worship of Satan . . . marked by the travesty of Christian rites." Webster's Third New Intern'l Dictionary 2016 (2002). A "Satanist" is, literally by definition, "one that is regarded as inherently evil."

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[2] Twelve Washington opinions include the word "Satan" or "Satanism." In most cases, the term is raised in the context of discussing the defendant's mental competency or insanity in view of a belief that Satan directed him to commit a violent act.

[3] *See* also *Monschke*, 2006 Wash. App. LEXIS 1104 (evidence of white supremacist beliefs admissible to prove motive, premeditation, and to show the context of the crime where the State's theory was that defendant killed victim out of hatred for anyone deemed inferior and to enhance his status among white supremacists); *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964 (1998) (gang affiliation evidence admissible to prove motive for murder where evidence established that killing someone heightened a gang member's status).

Webster's, at 2016. We cannot think of evidence that carries a greater danger of unfair prejudice than evidence of a person's association with Satanism, especially where, as here, there is no evidence that a defendant ever acted on his Satanic beliefs to cause harm in the past.

Like gang affiliation evidence, the State may not introduce evidence of Satanism unless it establishes a sufficient nexus between the defendant's ties to Satanism and the crime charged. We find such a nexus lacking here.

In *Monschke*, the State's theory was that Monschke beat a homeless man with a baseball bat then "curb-stomped" him on the railroad tracks because of Monschke's hatred for those he considered inferior and to enhance his status among white supremacists. 2006 Wn. App. LEXIS 1104 at 40-41. The evidence showed that Monschke was a member of a white supremacist group that advocates violence, that a member of such a group could earn the right to wear red shoelaces and bolts by assaulting or killing someone, that Monschke boasted about earning such emblems, and that he repeatedly watched a movie that showed a white supremacist "curb-stomping" someone in the same manner as the State alleged. Although highly prejudicial, the evidence was admissible to prove motive, intent, premeditation, and res gestae for Monschke's murder of the victim.

Similarly, evidence of the defendants' gang affiliation and drug activity was admissible to prove motive and intent in *Boot* and *Campbell*, where the State's theory was that the defendants were gang members and drug dealers who responded violently to threats to their status and territory. *State v. Boot*, 89 Wn. App. 780, 789-90, 950 P.2d 964 789-90 (1998); *Campbell*, 78 Wn. App. at 822. In each case, the court admitted gang affiliation evidence after finding a sufficient nexus between gang culture, gang activities, drugs, and the murders charged to support

the State's theory that the crimes were gang-related.

The nexus apparent in *Monschke*, *Boot*, and *Campbell* is lacking here. On appeal, the State argues that the following evidence of Satanism was relevant and admissible to prove Stensrud's motive and intent: that Stensrud may have viewed the baby killing as a means to enhance his status with the Antichrist and that he endorsed the concept of killing the weak. But in offering the evidence, the State also told the trial court that it did not view the killing as "an act of Satanism" or "anything involving Satanism." 2 RP at 11, 42. Nevertheless, the State sought admission of the evidence to prove Stensrud's "belief that there was really nothing wrong with killing this baby." 2 RP at 43. In view of the State's assertion that the killing was not an act of Satanism, its theory of relevance appears to be that someone who believes in Satanism is more likely to commit an evil act like murder. This is precisely the kind of logical inference forbidden by ER 404(b). And it was particularly prejudicial here where the evidence was uncontroverted that Stensrud's Satanic beliefs had never prompted harmful Satanic acts in the past.

The State did not establish a sufficient nexus between Stensrud's Satanic beliefs and the crimes charged. The prosecutor said, "We are trying to get to justice here. We are leaving the jury with the impression that he doesn't hurt anything, and that is absolutely contrary to the evidence," apparently referring to Stensrud's bedroom décor. 5 RP at 423. Although the posters and music the State presented depict morbid and violent themes, they do not evidence actual violent conduct by Stensrud or other Satanists. This is unlike the situation in *Monschke*, *Boot*, and *Campbell*, where the State presented evidence of actual criminal activity associated with gangs. *Compare Monschke*, 2006 Wash. App. LEXIS 1104 (gang members earn shoe laces and bolts by committing violent acts); *Boot*, 89 Wn. App. 780 (violent retaliation for disrespectful

behavior is a gang membership tenet); *Campbell*, 78 Wn. App. 813 (gang members respond with violence to encroachments on drug-dealing turf). *See also United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) (gang members take an oath to commit perjury on each other's behalf). The posters, music, Satanic bible, black candles, pentagrams, and other evidence of Satanism do not sufficiently establish a link between Stensrud's Satanic beliefs and the crimes charged to support the admission of this highly prejudicial evidence.

Moreover, unlike in *Monschke*, *Boot*, and *Campbell*, in its final ruling the trial court inadequately explained its view of the relevance of the evidence of Satanism and failed to adequately balance its probative value and prejudicial impact on the record. *Compare Boot,* 89 Wn. App. at 788, and *Campbell*, 78 Wn. App. at 818 (trial courts admitted some evidence but excluded other evidence). In contrast, in its earlier rulings, the trial court recognized the highly prejudicial effect of the evidence and declined to admit it. Then later, without explanation for changing its ruling, it admitted all the State's evidence of Satanism, despite the State's recognition that it did not view the crimes as "anything involving Satanism" or an "act of Satanism." We hold that the trial court's rulings allowed the evidence of Satanism to improperly permeate the trial, resulting in an unfair trial.

We next address arguments specific to individual evidentiary decisions the trial court made in admitting the evidence of Satanism.

Evidence of Satanic Ritual

The trial court erred in admitting testimony through Bohannan that Stensrud performed a Satanic ritual on the baby's body. The State's theory of relevance was that the evidence corroborated Bohannan's testimony. Defense counsel correctly argued that there was no need to

reference Satanism to corroborate Bohannan's testimony. We agree with Stensrud because the State could have corroborated Bohannan's testimony by describing the personal items found with the baby. Although relevant, the evidence had only slight probative value in view of the availability of alternate ways of corroboration. Further, Bohannan testified that Stensrud intended to "protect" and not harm the baby with these items. Thus, it had no logical relevance to prove Stensrud's criminal intent.

On appeal, the State argues that the evidence of the Satanic ritual was relevant to show Stensrud's untruthfulness to police when he denied performing a Satanic ritual. Stensrud responds that the State cannot introduce extrinsic impeachment evidence to prove a collateral matter.

Evidence is collateral if the cross-examining party could not present it as substantive evidence. *See State v. Putzell*, 40 Wn.2d 174, 183, 242 P.2d 180 (1952). Here, Stensrud did not deny that he placed personal items in the bag; he merely denied Bohannan's characterization of it as a "Satanic ritual." Whether Stensrud's action was a Satanic ritual, as opposed to a Christian one, was irrelevant and inadmissible as substantive evidence. Thus, the evidence was not admissible to show Stensrud's untruthfulness.

The State also argues that the evidence was admissible to prove the context in which the crime occurred. Under the res gestae exception, evidence of prior acts may be admissible to show the context in which a crime occurred by proving the events that occurred before and after. *State v Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)). But the evidence must be relevant to a material issue. *Lane*, 125 Wn.2d at 831. And each act must be "a piece in the

mosaic necessarily admitted in order that a complete picture be depicted for the jury." *Tharp*, 96 Wn.2d at 594.

References to a Satanic ritual were not necessary to complete a picture of the crime. The State maintained that it did not theorize that the killing was an act of Satanism. Although Stensrud's handling of the baby's body, and his act of placing personal items with the baby, may have been relevant and necessary to complete the story for the jury, the State's characterization of his conduct as a "Satanic ritual" was not. The State refers to Stensrud's placing objects, including what it refers to as a gargoyle, with the baby. But the medical examiner identified the objects as two stuffed animals, a bracelet, and a metal eagle charm attached to part of a necklace string. Given the danger of unfair prejudice and the slight probative value of the evidence, the trial court abused its discretion in admitting the references to a Satanic ritual.

Psychic

The trial court further erred in admitting evidence that a psychic told Stensrud he could become the Antichrist if he bathed in the blood of his first born child. Bohannan testified that Stensrud jokingly related the psychic's comment several months before Dearinger became pregnant.

The State incorrectly asserts that Stensrud did not preserve the issue for appeal. In a pretrial motion, Stensrud moved to exclude all references to Satanism, specifically arguing that any such references should not come in through Bohannan's testimony. The trial court overruled the objection and gave no indication of its willingness to reconsider the ruling. Stensrud had a standing objection to the testimony and was not required to renew his objection at trial. *See Powell*, 126 Wn.2d at 257.

The State asserts that the testimony was admissible to prove motive, suggesting that Stensrud would see the killing as a means of "enhancing his status with the [A]ntichrist." Resp't's Br. at 13. Motive is an impulse, desire, or any other inducement to commit a criminal act. *Powell*, 126 Wn.2d at 259. Particularly in largely circumstantial cases, prior misconduct may be relevant and admissible to establish motive. *Powell*, 126 Wn.2d at 260 (prior threats and assault of spouse relevant to establish motive for murder).

But the State's argument is belied by its own assertion that it did not view the killing as an act of Satanism. Nothing showed that anyone mutilated the body, that Stensrud attempted to bathe in the baby's blood, or that the killing was an act of Satanism. Moreover, the State did not use the Satanic evidence to establish motive; it did not argue to the jury that Stensrud killed the baby because he believed it would enhance his status with the Antichrist. The interjection of this highly inflammatory and prejudicial evidence did nothing but portray Stensrud as evil, based on his beliefs.

Stensrud's Beliefs

The trial court further erred in admitting Stensrud's statement to police that he was involved in Satanism because it "conflicted with Christianity, morals, and values." 4 RP at 373.

The State argues that the statement was admissible to show Stensrud's "motivation and/or belief that there was nothing wrong with killing this baby." Resp't's Br. at 16. In the State's view, the evidence is relevant because "it was more likely that someone very active in satanic beliefs would engage in this behavior." Resp't's Br. at 13-14.

Stensrud's statement to Taylor was not probative of his motive. The State's theory of relevance rests on the assumption that someone who is antagonistic to Christianity is more likely

to commit murder than someone who is not. Not only does the record fail to support this assertion, but also this is raw propensity evidence, inadmissible under ER 404(b), and the trial court abused its discretion in admitting it.

Mickey Mouse Illustration

Stensrud also contends the trial court erred in admitting the Mickey Mouse illustration. At trial, the State argued that this evidence was necessary to rebut Taylor's testimony that Stensrud said he was "involved in Satanism simply because it conflicted with Christianity, morals, and values, but he wasn't into hurting anyone." 4 RP at 373. At first, the trial court agreed that Stensrud had not opened the door when he cross-examined Taylor about the comment elicited during the State's direct examination. But then, without explaining why it was contradicting its earlier ruling, the trial court agreed with the State and admitted this evidence.

The use of prior bad acts to rebut "'any material assertion by a party' is a well-established exception to ER 404(b)." *State v. Hernandez*, 99 Wn. App. 312, 321, 997 P.2d 923 (1999) (quoting 5 Karl B. Tegland, Washington Practice: Evidence § 114, at 391, § 117, at 411 (3d ed. 1989)). In *Hernandez*, for instance, evidence of a prior assault was admissible to rebut the defendant's defense that the victim's death was an accident. 99 Wn. App. at 323. *See also State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987) (evidence that defendant previously threatened others with a gun admissible to rebut self-defense claim in murder prosecution). Similarly, when a party opens up a subject of inquiry on cross-examination, the opposing party may inquire further into that subject during redirect examination. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 718 P.2d 407 (quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)), *cert. denied*, 479 U.S. 995 (1986), *overruled on other grounds*, *State v. Hill*, 123 Wn.2d 641,

870 P.2d 313 (1994).

Here, the State first elicited, through Taylor, Stensrud's statement that he was interested in Satanism "simply because it conflicted with Christianity, morals, and values, but he wasn't into hurting anyone." 4 RP at 373. Following his unsuccessful objection to the testimony, Stensrud's counsel sought to mitigate the damage by eliciting testimony that Stensrud said he was only interested in atheistic Satanism, not God-hating or violent Satanism. The trial court should have excluded references to Satanism in the first instance. Stensrud did not open the door to additional evidence of Satanism by attempting to rebut improperly admitted evidence.

Photographs and Videotape of Stensrud's Bedroom

The trial court also erred when it permitted the State to present photographs and a videotape of Stensrud's bedroom to rebut Taylor's testimony that Stensrud said he "never hurt anything." 5 RP at 534.

The State argues that the bedroom evidence was necessary to establish that Stensrud was deeply entrenched in Satanism and had adopted "violent beliefs." Resp't's Br. at 20. Again, absent evidence linking Satanic beliefs with actual criminal activity, the trial court should have excluded references to Satanism altogether.

Dying Fetus CD

The trial court also erred when it admitted the "Dying Fetus" CD wrapper found in Dearinger's bedroom. The State's theory of relevance was that it tended to prove that Dearinger and Stensrud were "into bizarre music and a different lifestyle" and did not want the baby 6 RP at 585.

Whether they liked bizarre music and had adopted a different lifestyle was irrelevant, and thus the wrapper was inadmissible to establish that fact. Moreover, the State failed to lay a foundation to show that the wrapper was relevant to prove Stensrud did not want the baby. There is no evidence in the record linking the CD to the baby's death. For instance, there is no evidence establishing when the CD was purchased, or by whom, or whether it was purchased for any reason other than the listener's musical taste. Because the State did not present adequate evidence of relevancy, the trial court abused its discretion in admitting the CD wrapper.

Drug Use

We further hold that the trial court did not abuse its discretion in admitting evidence of

Stensrud's drug use. Although prejudicial, it was relevant and admissible to show his knowledge that the baby would likely be in distress at birth and require urgent medical care and, thus, his intent. And, in fact, the autopsy showed high levels of methamphetamine in the baby's system.

Stensrud argues that it was only necessary to admit evidence that he was under the influence of drugs at the time of the baby's birth and that additional evidence that he used drugs and supplied them to Dearinger in the past was unfairly prejudicial. We disagree.

Stensrud knew that the drugs were harmful to the baby. Evidence that he was aware Dearinger used drugs throughout her pregnancy and actually shared his drugs with her is probative of his intent. The evidence makes it more likely that he and/or Dearinger did not want the baby and intended to harm it. The trial court did not abuse its discretion in admitting this evidence.

Harmless Error Analysis

The State argues that even if the trial court erred in permitting it to present evidence of Stensrud's ties to Satanism during its case in chief, the error is harmless because it is merely cumulative of the Satanic references the State properly introduced during cross-examination of Stensrud's character witnesses. We disagree. It was the State that first introduced evidence of Stensrud's Satanism. Thus, it was the State, not Stensrud, who opened the door.

The erroneous admission of evidence is harmless if it is merely cumulative of properly admitted evidence. *State v. Acheson*, 48 Wn. App. 630, 635, 740 P.2d 346 (1987).

Stensrud presented character witnesses to rebut the State's evidence of his ties to Satanism. The State then presented more evidence of Satanism during its cross-examination of those witnesses. The State's argument that the inadmissible evidence is merely cumulative of

proper impeachment evidence is flawed. First, although Stensrud did not object during cross-examination, his continuing objection to evidence of Satanism remained in effect. *See Powell*, 126 Wn.2d at 257. Second, the State's impeachment evidence cannot serve to legitimize evidence that should not have been admitted in the first instance.

As Stensrud correctly argues, the State's impeachment evidence is "part and parcel" of the improper admission of character evidence the State presented in its case in chief. Further, the substantive evidence qualitatively differs from impeachment evidence and cannot be cumulative of it. The impeachment evidence here was admissible only to undermine the credibility of Stensrud's character witnesses by demonstrating their lack of familiarity with Stensrud's ties to Satanism. In contrast, the evidence the State presented in its case in chief was substantive evidence of Stensrud's Satanic possessions and beliefs, from which the State argued that Stensrud actually was a violent Satanist.

The State relies on *State v. Styles*, 93 Wn.2d 173, 606 P.2d 1233 (1980), in support of its argument. In *Styles*, our Supreme Court noted that in presenting character evidence, a defendant runs the risk of prejudice from the jury's exposure to prior bad acts via cross-examination of character witnesses. 93 Wn.2d at 176. Although such evidence is admissible only to impeach the credibility of the testifying witness, its practical effect is to attack the defendant's character. Nevertheless, character evidence improperly admitted as substantive evidence during the State's case in chief cannot be cumulative of impeachment evidence because the evidence is admitted for different purposes. To hold otherwise would be to place a stamp of approval on the jury's perhaps unavoidable, but nonetheless improper, consideration of impeachment evidence.

We review erroneous admission of evidence under a non-constitutional harmless error

analysis. *Tharp*, 96 Wn.2d at 599. The error requires reversal if there is a reasonable probability that it materially affected the trial outcome. *Tharp*, 96 Wn.2d at 599

Here, the error was not harmless. This is not a case where a "new trial will inevitably arrive at the same result," as in *Tharp*, 96 Wn.2d at 600 (erroneous admission of prior conviction harmless in view of overwhelming direct evidence of defendant's guilt). The jury verdict largely turned on its view of Stensrud's version of the events that he told to others. It is reasonably likely that the highly inflammatory and unfairly prejudicial evidence of Stensrud's ideological ties to Satanism materially affected the jury's determination of his credibility and thus the outcome of the trial.

Stensrud stated that he planned to take Dearinger to the hospital for the baby's birth but that the baby arrived unexpectedly and Dearinger smothered her, without his knowledge, while he was in the bathroom cleaning up the afterbirth at her direction. A number of facts support Stensrud's version of the incidents. He told his co-workers that Dearinger was pregnant and called into work to report that she was having the baby. He went to work the day after the baby died, appearing very upset and anxious, and told a co-worker that Dearinger said she had smothered the baby while he was in another room. He readily cooperated with police investigators. Although he first claimed the baby was stillborn, minutes later, during the same interview, he admitted she was born alive and said that Dearinger told him that she smothered the baby. His recitation of the facts to Bohannan and to police investigators remained consistent thereafter.

Although there was no evidence that Stensrud ever acted on a Satanic belief to harm anyone or anything, the State nonetheless repeatedly used his beliefs to support its theory that

Stensrud participated in the baby's murder to fulfill a Satanic belief. But for the highly prejudicial evidence of his ideological ties to Satanism, the jury may have believed that Stensrud intended to take Dearinger to the hospital but she unexpectedly gave birth and smothered the baby while he was in another room.

During rebuttal argument, the prosecutor asked the jury to focus on the elements of the crime rather than on the fact that "the defendant is a drug user or that he worships Satan or that he is a bad guy." 9 RP at 114. Given the extent to which the State focused the jury's attention on evidence of Stensrud's Satanic beliefs throughout the trial, the prosecutor's words appear ironic, and they exemplify the rhetorical device of paralipsis, or emphasizing something by claiming to downplay or omit it.

The erroneous admission of evidence of Stensrud's belief in Satanism deprived him of a fair trial and requires reversal of his conviction for second degree intentional murder. It also requires reversal of his second degree felony murder and first degree criminal mistreatment convictions, as addressed below in the context of his insufficiency claim.

Sufficiency of the Evidence

Stensrud next claims that the evidence was insufficient to establish second degree intentional murder, second degree felony murder, or first degree criminal mistreatment.[4]

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it allows any reasonable person to find each element of the crime beyond a

[4] Although we reverse Stensrud's murder conviction, we must address his insufficiency claim to determine whether the State may retry him. *State v. Devries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) ("A defendant whose conviction has been reversed due to insufficient evidence cannot be retried."). We also address other assignments of error raised on appeal, exclusive of those not likely to arise on remand.

reasonable doubt. *State v*. *DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). An insufficiency claim admits the truth of the State's evidence and any reasonable inferences from it. *State v.*

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We consider circumstantial and direct evidence equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We do not review credibility determinations or re-weigh the evidence on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A. Intentional Murder

The State charged Stensrud as either a principal or an accomplice to second degree intentional murder. The elements of second degree intentional murder are that the defendant intends to cause the death of another, but without premeditation, and that the defendant causes the death. *State v. Gamble*, 154 Wn.2d 457, 469 n.9, 114 P.3d 646 (2005); RCW 9A.32.050(1)(a).

A person is liable as an accomplice if, "with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). To prove complicity, the State must establish more than mere presence and assent, but that the defendant was ready to assist in the crime. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

The State presented evidence that Dearinger and Stensrud did not want the baby. They concealed the pregnancy from their parents. Stensrud supplied Dearinger with methamphetamine during the pregnancy, knowing it was harmful to the baby. They discussed giving the baby up for adoption. But they believed no one would want the baby because of the adverse effects of its exposure to x-rays, prescription drugs, nicotine, alcohol, methamphetamine, and the lack of any prenatal care.

When Stensrud first saw the baby, he thought it had deformed feet and otherwise did not look like a normal baby. Stensrud admitted covering the baby's mouth for at least a short time to keep it quiet. Stensrud cut the baby's umbilical cord but he did not clamp the cord or tie it off. Only Dearinger and Stensrud were present during the baby's brief life. The baby died from asphyxiation shortly after birth. Neither Stensrud nor Dearinger called 911, otherwise summoned help, or attempted to resuscitate the baby. After the baby died, Stensrud took several steps to conceal the birth and the baby's body. Stensrud first told a co-worker, "We killed it," and asked for advice on how to dispose of the body. 3 RP at 104.

Viewed in the light most favorable to the State, the evidence sufficiently supports reasonable inferences leading to the conclusion that Stensrud either killed the baby himself or acted as Dearinger's accomplice in killing the baby. Thus, sufficient evidence would prove second degree intentional murder.

B. Felony Murder

In the alternative, the State charged Stensrud with second degree felony murder predicated on first or second degree criminal mistreatment. Again, the State charged Stensrud as either a principal or an accomplice. To prove second degree felony murder, the State had to establish that, while committing or attempting to commit any felony, and in the course of and in furtherance of such crime, Stensrud or an accomplice caused the baby's death. RCW 9A.32.050(1)(b).

To prove second degree criminal mistreatment, the State had to establish that Stensrud was the baby's parent and recklessly either (a) created an imminent and substantial risk of death or great bodily harm or (b) caused substantial bodily harm by withholding any of the basic necessities

of life. RCW 9A.42.030(1). Stensrud stipulated that he was the baby's biological father.

Stensrud claims the felony murder conviction requires reversal because (1) there is no accomplice liability for criminal mistreatment, yet the jury instructions allowed the jury to convict him based on its determination that he was an accomplice to Dearinger's criminal mistreatment of the baby; and (2) the evidence was insufficient to prove that Stensrud committed criminal mistreatment or that the baby died as a result of his actions or inaction.

1. Jury Instructions on Accomplice Liability and Criminal Mistreatment

Stensrud's first argument actually challenges the jury instructions, although he brings it in the context of an insufficiency claim. He argues that the "to convict" instruction for felony murder and criminal mistreatment relieved the State of its burden to prove every element of the crime by permitting the jury to convict him if it found he was an accomplice to Dearinger's criminal mistreatment of the baby.

Stensrud did not except to the jury instructions at trial. But an instructional error that relieves the State of its burden to prove every element of the crime is a manifest constitutional error that we may review for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a)(3).

We review jury instructions de novo. *Mills*, 154 Wn.2d at 7. Instructions are adequate if they accurately state the applicable law, are supported by substantial evidence, and allow each party to argue its theory of the case. *Mills*, 154 Wn.2d at 7.

The trial court instructed the jury that to convict Stensrud of second degree felony murder, the State must prove beyond a reasonable doubt that "the defendant was committing or attempting to commit the crime of criminal mistreatment in the first or second degree" and that

"the defendant or another participant in the crime of criminal mistreatment caused the death of baby girl Dearinger in the course of and in furtherance of such crime." CP at 68.

The "to convict" instruction for first degree criminal mistreatment states the element, "the defendant or a person to whom defendant acts as an accomplice," caused great bodily harm by withholding any of the basic necessities of life. CP at 82. The "to convict " instruction for second degree criminal mistreatment stated the element, "the defendant or a person to whom defendant acts as an accomplice," either created an imminent and substantial risk of great bodily harm or caused substantial body harm by withholding any of the basic necessities of life. CP at 84.

Stensrud relies on *State v. Jackson*, 137 Wn.2d 712, 976 P.2d 1229 (1999), arguing that there can be no accomplice liability for the crime of criminal mistreatment. In *Jackson*, our Supreme Court reversed the felony murder convictions of two parents whose foster child died as a result of injuries inflicted by one or both of them. The Court held that the accomplice liability statute does not impose criminal liability on a parent for failing to come to the aid of a child who is the victim of a criminal act. *Jackson*, 137 Wn.2d at 725. The trial court had erroneously instructed the jury that it could convict either or both defendants as accomplices to felony murder based on their failure to protect the child. The jury returned a guilty verdict, without indicating whether it convicted the defendants as principals or accomplices. In reversing the convictions, the Court held that the error was not harmless because it was possible the jury convicted one or both based on the erroneous accomplice instruction. *Jackson*, 137 Wn.2d at 727.

Jackson is distinguishable. In *Jackson*, the accomplice liability instruction permitted the jury to convict the defendant based on a failure to act, an alteration of the proper pattern instruction that more than mere presence and assent is required to establish accomplice liability.

Here, the trial court correctly instructed the jury that the jury must find that Stensrud intentionally committed an affirmative act to convict him as an accomplice.

But even assuming the jury instructions incorrectly permitted the jury to convict Stensrud as an accomplice to criminal mistreatment, the error is harmless.

An instructional error that omits or misstates an essential element is harmless if it appears beyond doubt that the error did not contribute to the verdict. *State v. Thomas*, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004) (erroneous accomplice liability instruction held harmless where overwhelming evidence showed the defendant acted as a principal to the crime). An instructional error is harmless when uncontroverted evidence supports the omitted or misstated element. *Thomas*, 150 Wn.2d at 845.

Here, the State alleged that Stensrud committed criminal mistreatment by withholding necessary medical care from the baby. The State did not argue that Stensrud committed the crime by acting as an accomplice to Dearinger's criminal mistreatment of the baby.

The State presented uncontroverted evidence that Stensrud knew the baby was exposed to harmful substances throughout its gestation, that he was present in Dearinger's bedroom when she gave birth in the next room, that he put his hand over the baby's mouth to quiet her, that he saw the baby gasping for breath, and that he did not call 911, summon help, or attempt to resuscitate the baby when Dearinger showed him that the baby had stopped breathing.

This uncontroverted evidence establishes that Stensrud committed second degree criminal mistreatment as a principal, creating an imminent and substantial risk of great bodily harm by withholding necessary medical treatment from the baby. Thus, the instructional error, if any, was harmless.

Sufficient evidence supports finding that Stensrud committed the predicate felony of second degree criminal mistreatment.

2. Sufficiency of the Evidence: Felony Murder

Stensrud further argues, however, that insufficient evidence supports the causation element of second degree felony murder. He contends that insufficient evidence proves that he caused the baby's death because Dearinger's act of suffocating the baby was the superseding intervening cause of death.

The trial court instructed the jury that, "[i]f a proximate cause of the death was a later independent intervening act of the deceased or another that the defendant, in the exercise of ordinary care, could not reasonably have anticipated as likely to happen, the defendant's acts are superseded by the intervening cause and are not a proximate cause of the death." CP at 72.

The State presented sufficient evidence for the jury to believe that Stensrud knew Dearinger suffocated the baby. The jury reasonably could have concluded that he withheld necessary medical care in order to facilitate Dearinger's suffocation of the baby and that his act was a proximate cause of the baby's death. Thus, the evidence sufficiently supported the conviction of second degree felony murder predicated on second degree criminal mistreatment.

We also note that, on the other hand, the jury reasonably could have concluded that, although Stensrud committed second degree criminal mistreatment by withholding necessary medical care, that act was not a proximate cause of the baby's death because he intended to get the baby to the hospital but Dearinger suffocated the baby while he was in another room, unaware. The jury reasonably could have concluded that Dearinger's actions were a superseding intervening cause of death.

Because there is a reasonable likelihood that the improperly admitted propensity evidence took away reasonable doubts the jury may have had about Stensrud's guilt, his second degree felony murder conviction must be reversed. Nevertheless, the evidence sufficiently supports a guilty verdict. Accordingly, nothing precludes the State from trying Stensrud again.

C. First Degree Criminal Mistreatment

Stensrud claims that insufficient evidence supports his conviction of first degree criminal mistreatment.

To prove first degree criminal mistreatment, the State had to prove that Stensrud recklessly caused great bodily harm to the baby by withholding any of the basic necessities of life. RCW 9A.42.020(1).

A person acts recklessly "when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(c). "Great bodily harm" means "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ." RCW 9A.42.010(2)(c).

The State argues that Stensrud caused great bodily harm by (1) cutting the umbilical cord and failing to clamp it; (2) covering the baby's mouth with his hand although it had difficulty breathing; and/or (3) failing to call 911, otherwise summon help, or attempt to resuscitate the baby.

Again, the evidence sufficiently supports a conviction but it is not strong enough to render harmless the improperly admitted propensity evidence. By his own admission, Stensrud cut the

umbilical cord but failed to tie it off. Medical testimony established that failing to clamp the umbilical cord could cause significant uncontrolled bleeding, leading to death. Depending on the jury's evaluation of Stensrud's version of the events, it could have believed either that he understood the dangers of an unclamped cord and acted recklessly, or that he was unaware of the danger and did not.

Also, by Stensrud's own admission, he covered the baby's mouth with his hand. Depending on the jury's evaluation of Stensrud's credibility, it either could have believed him when he said he only covered the baby's mouth momentarily, attempting to quiet it, or it could have believed that he actually suffocated the baby, recklessly causing her great bodily harm.

Stensrud admitted that he failed to obtain medical aid for the baby although he recognized that she struggled to breathe. Depending on the jury's evaluation of Stensrud's credibility, it could have believed him when he said he intended to take the baby to the hospital as soon as he cleaned the bathroom at Dearinger's insistence, he expected Dearinger to help the baby breathe in the meantime, and he did not anticipate that Dearinger would smother the baby during the five minutes he was in the bathroom. Alternately, the jury could have believed that Stensrud knew Dearinger would harm rather than help the baby and that he recklessly caused the baby great bodily harm by failing to intervene and to obtain medical aid.

Because there is a reasonable probability that the jury's consideration of improperly admitted propensity evidence affected its determination of these critical factual issues, Stensrud's conviction of first degree criminal mistreatment must be reversed. But because sufficient untainted evidence supports the conviction, the State may retry him.

Exclusion of Pastor Rush's Testimony

Stensrud further contends that the trial court erred in excluding testimony by Pastor Rush as to Stensrud's nonviolent character. The trial court based its decision on the ground that Rush only learned of Stensrud's reputation after the alleged crime occurred.

Under ER 405(a), "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation." The rule does not require that a character witness acquire his or her knowledge of the defendant's reputation prior to the time of the crime charged. That Rush became familiar with Stensrud's reputation only after the baby's death goes to the weight and credibility of her testimony rather than its admissibility. *See State v. Land*, 121 Wn.2d 494, 499, 851 P.2d 678 (1993) (cross-examination, not exclusion, is the appropriate remedy for allegedly biased character witnesses). Thus, her testimony was not per se inadmissible, although the trial court retains its broad discretion to either admit or exclude it on other appropriate grounds on remand.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____
Houghton, P.J.

We concur:

_____ _____
Bridgewater, J. Hunt, J.